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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANDREW SCHWARTZ et al., Plaintiffs and Respondents, v. VISTA POINTE SALTON SEA, LLC, Defendant and Appellant.	D052988 (Super. Ct. No. ECU03643)

APPEAL from an order of the Superior Court of Imperial County, Joseph W. Zimmerman, Judge. Affirmed.

Vista Pointe Salton Sea, LLC (VPSS) appeals from the trial court's order denying its petition to compel arbitration in a lawsuit by 35 plaintiffs alleging construction defects in VPSS's residential housing development. As we will explain, we conclude that the trial court was within its discretion to deny the petition to compel arbitration on the ground that conflicting rulings on common issues of law or fact might arise if those plaintiffs who entered into arbitration agreements with VPSS were ordered to arbitrate

while other plaintiffs who did not enter into agreements with VPSS were permitted to pursue identical claims in the trial court. Accordingly, we affirm the order denying the petition to compel arbitration.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Allegations of Plaintiffs' Complaint*

Plaintiffs are 35 individuals who purchased homes in VPSS's housing development in Salton City, California (the Development).[1] Plaintiffs' main complaint is that their homes contain construction defects that are common throughout the development, including problems with building pads, windows, driveways, sidewalks,

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1 Because the first amended complaint is inartfully pled, we have had difficulty determining the identity of the named plaintiffs in this action. The first paragraph of the first amended complaint indicates that this is a class action and "Andrew Schwartz and Julie Schwartz [(the Schwartzes),] owners of 1441 Carpenter Avenue, Salton City, CA 92254, bring this action individually and on behalf of all other homeowners similarly situated." In contrast, however, the caption to the first amended complaint lists the Schwartzes as well as 33 other individuals as the plaintiffs. Further, a total of 35 individuals (including the Schwartzes) are listed in the body of the first amended complaint as "the Plaintiffs." This statement, however, is not helpful because the first amended complaint defines "the Plaintiffs" as "both the named plaintiffs and each prospective class member." We thus turn to other items in the record to determine the identity of the named plaintiffs. The only indication we find in the record as to the identity of the named plaintiffs is in declarations that seven of the 35 individuals filed in connection with plaintiffs' counsel's application for a temporary restraining order and preliminary injunction (the TRO application). The seven individuals (none of whom were the Schwartzes) described themselves as "plaintiff[s]" in this action. Further, we find it significant that the TRO application was filed by plaintiffs' counsel to obtain an order to stop VPSS from having direct contact with his "clients." Based on these facts, we interpret the complaint as stating that all 35 individuals named in the caption of the complaint are currently clients of plaintiffs' counsel and are the parties who filed this action as named plaintiffs ("Plaintiffs").

framing and slabs. Plaintiffs' first amended complaint (the complaint) asserted claims against (1) VPSS; (2) three other entities alleged to be owners and developers of the Development (Frontier Homes, Inc.; Frontier Homes, LLC; and Frontier Builders, LLC); and (3) Mike Dwight, who was allegedly the real estate broker for the Development.

Against all of the defendants except Dwight, the complaint alleged causes of action for (1) construction defects under Civil Code section 895 et seq., (2) breach of contract, (3) breach of express warranties and (4) negligent misrepresentation. The complaint also alleged causes of action for failure to disclose and fraud against all of the defendants.[2]

B. *All of the Plaintiffs Except the Clevelands, the Roods and the Rafaels Entered Into Real Estate Purchase Agreements With VPSS, and Those Agreements Contain Mandatory Arbitration Provisions*

Most of the Plaintiffs entered into real estate purchase agreements with VPSS.[3] Although there are differences between some of the purchase agreements, they all contain the same mandatory arbitration provision.[4]

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2 According to VPSS, it is the only defendant to have appeared in this action. However, Plaintiffs' appellate briefing discusses the fact that a demurrer filed by Dwight was sustained with leave to amend.

3 The real estate purchase contracts with VPSS stated that the seller was an entity identified as "Vista Point LLC" (not "Vista Pointe Salton Sea, LLC"). However, the parties subsequently stipulated that the real estate purchase contracts would be reformed to identify VPSS as the seller.

4 The arbitration provisions provided: "ANY AND ALL CLAIMS, CONTROVERSIES, BREACHES OR DISPUTES BY OR BETWEEN THE PARTIES HERETO . . . ARISING OUT OF OR RELATED TO THE AGREEMENT, THE PROPERTY, THE PROJECT OF WHICH THE PROPERTY IS A PART, THE SALE OF THE PROPERTY

However, three of the homes at issue in this case were not sold by VPSS. Specifically, plaintiffs David and Cheryl Cleveland (the Clevelands) and Robert and Aide Rood (the Roods) and Gustavo and Yolanda Rafael (the Rafaels) bought model homes in the Development that were sold to them by Frontier Finance Company (Frontier Finance), not VPSS.[5] The purchase agreements in the record for those Plaintiffs who purchased their homes from Frontier Finance contain mandatory arbitration provisions, but Frontier Finance is not a party to this litigation.

C. *VPSS Files a Petition to Compel Arbitration Against All of the Plaintiffs, Including the Clevelands, the Roods and the Rafaels*

Relying on the arbitration provisions in the purchase agreements entered into by the Plaintiffs, VPSS filed a petition to compel arbitration of the claims brought by all of the Plaintiffs, even those who bought their homes from Frontier Finance.[6]

BY SELLER, OR ANY TRANSACTION RELATED HERETO . . . SHALL BE ARBITRATED PURSUANT TO THE FEDERAL ARBITRATION ACT . . . . "

[5] The record contains contracts for only two of the three model homes that were sold by Frontier Finance, namely the homes of the Clevelands and the Roods. However, a declaration by Mike Dwight submitted by VPSS states that the home purchased by the Rafaels was sold by Frontier Finance. Similarly, at the hearing on the petition to compel arbitration, counsel for Plaintiffs acknowledged that "three homeowners" purchased from Frontier Finance, not from VPSS. For reasons that are not clear to us, VPSS later did not include the Rafaels in its list of those Plaintiffs who contracted with Frontier Finance rather than with VPSS. Based on the Dwight declaration, we assume for the purposes of this opinion that the Clevelands, the Roods and the Rafaels entered into a purchase agreement with Frontier Finance, not with VPSS. We note, however, that we would still reach the same disposition in this case if only the Clevelands and the Roods had contracted with Frontier Finance.

[6] VPSS also filed a motion asking the court to order Plaintiffs to comply with the portion of the purchase agreements requiring certain pre-arbitration dispute resolution

In their opposition to the petition to compel arbitration, Plaintiffs argued that the arbitration provisions were unenforceable because those provisions were unconscionable and were contracts of adhesion. At the hearing on the petition to compel arbitration, Plaintiffs presented additional arguments in opposition. First, they argued that VPSS had not established that each of the Plaintiffs had entered into an agreement to arbitrate with VPSS, as some of the Plaintiffs had entered into purchase contracts with Frontier Finance. Second, they argued that if the court were to compel arbitration of Plaintiffs' claims, it would create "a significant possibility of conflicting rulings" because there were other parties who might not take part in the arbitration proceeding and who might obtain conflicting rulings in the trial court. Specifically, Plaintiffs focused on the other defendants who had not yet appeared in the action, the Plaintiffs who entered into contracts with Frontier Finance, and the subcontractors that could be brought into the litigation by VPSS. Plaintiffs argued that, accordingly, the trial court should deny the petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2, subdivision (c).[7]

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procedures. In its petition to compel arbitration, VPSS stated that if the case was ordered to arbitration, the arbitrator should decide whether to order compliance with the pre-arbitration dispute resolution procedures.

[7] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

At the conclusion of the hearing, the trial court did not indicate how it would rule and requested that the parties submit proposed statements of decision supporting their respective positions.[8]

D. *The Trial Court Denies VPSS's Petition to Compel Arbitration*

The trial court issued an order denying the petition to compel arbitration based on two grounds. First, the trial court stated that "[t]he motion to compel arbitration is denied under the authority of . . . section 1281.2, subdivision (c) as there is a possibility of conflicting rulings on common issues of law or fact should the matter proceed to arbitration." Second, the trial court stated: "In addition, [VPSS] ha[s] not met their legal burden . . . or factual burden to establish the orders they seek regarding arbitration . . . ." The trial court explained that it had "factual concerns about various versions of the purchase agreements," including the agreement entered into by some of the Plaintiffs with Frontier Finance, and noted that "[i]t is undisputed that not all of the plaintiffs signed contracts with [VPSS]." The trial court concluded, "The sheer number, types and versions of contracts and their reoccurrence as exhibits in this litigation . . . do not aid [VPSS's] position in these matters establishing a *prima facie* case . . . ."

VPSS appeals from the order denying its petition to compel arbitration.[9]

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8 We note that although this action was filed as a proposed class action, neither the parties nor the trial court made any mention of that fact when discussing VPSS's petition to compel arbitration.

9 At the same time the trial court denied VPSS's petition to compel arbitration, it denied VPSS's request for an order requiring Plaintiffs to comply with the portion of the purchase agreements requiring certain pre-arbitration dispute resolution procedures.

II

DISCUSSION

The procedures governing petitions to compel arbitration are set forth in section 1281.2. The first inquiry is whether "an agreement to arbitrate the controversy exists." (§ 1281.2.) If the court finds an agreement to arbitrate, it must next inquire whether under the statutory exceptions set forth in sections 1281.2, subdivisions (a) through (c), it may nevertheless refuse to enforce the agreement to arbitrate.

The only statutory exception at issue here is the exception set forth in section 1281.2, subdivision (c). Under that provision, a court need not compel arbitration despite finding an agreement to arbitrate if "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . ." (§ 1281.2, subd. (c).) When these requirements are met, "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or

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VPSS purports to appeal from that ruling as well. We have jurisdiction to review the trial court's order denying VPSS's petition to compel arbitration under section 1294.2 because under that statute an order denying arbitration is immediately appealable. But the trial court's order denying VPSS's request for an order requiring Plaintiffs to comply with certain pre-arbitration dispute resolution procedures is not immediately appealable under section 1294.2, and Plaintiffs have presented no other jurisdictional basis for our review of that order. Thus, the only aspect of VPSS's appeal properly before us is the portion concerning the trial court's ruling on the petition to compel arbitration.

special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2.) Here, the trial court selected the option of refusing to enforce the arbitration agreement.

The party seeking to compel arbitration bears the burden of establishing that the parties entered into a valid agreement to arbitrate, while the party opposing a petition to compel arbitration bears the burden of proving any fact necessary to establish that any of the statutory exceptions apply. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 ["The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense."].)

A. *VPSS Did Not Establish the Existence of an Agreement to Arbitrate with Some of the Plaintiffs*

We first examine the threshold issue presented in VPSS's petition to compel arbitration, namely whether Plaintiffs entered into valid arbitration agreements with VPSS.

Plaintiffs argue that some of them did not enter into a purchase agreement with VPSS and thus never agreed to arbitrate their claims with VPSS. The trial court appears to have accepted this argument, as it found that "not all of the plaintiffs signed contracts with [VPSS]."

We review the trial court's determination as to the existence of an agreement to arbitrate under the substantial evidence standard. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.)

As explained in a declaration submitted by VPSS, three families — the Clevelands, the Roods and the Rafaels — purchased their homes from Frontier Finance rather than from VPSS. VPSS has identified no other contractual agreement with VPSS by the Clevelands, the Roods or the Rafaels containing a mandatory arbitration provision. Substantial evidence accordingly supports a ruling that the Clevelands, the Roods and the Rafaels did not agree to arbitrate their claims against VPSS.[10]

We thus affirm the trial court's ruling denying the petition to compel arbitration insofar as it relates to claims by the Clevelands, the Roods and the Rafaels on the ground that no valid arbitration agreement exists between those individuals and VPSS.

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10 For the first time in their appellate brief, Plaintiffs make several other arguments as to why VPSS did not meet its burden to establish that Plaintiffs entered into agreements to arbitrate with VPSS. Specifically, without any citation to the record, Plaintiffs argue that the purchase agreements submitted by VPSS in support of its petition to compel arbitration were not signed by the seller and were not properly authenticated by Dwight's declaration. Plaintiffs also argue for the first time on appeal that plaintiff Julie Schwartz did not sign a purchase agreement with VPSS, although Andrew Schwartz did. These arguments were not presented to the trial court and are not accompanied by citations to the record, and we thus decline to consider them. (See *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 ["It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal."]; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 [arguments not supported by adequate citations to record need not be considered on appeal].)

B. *The Trial Court Was Within Its Discretion to Deny the Petition to Compel Arbitration Based on the Possibility of Conflicting Rulings on Common Issues of Law and Fact*

The next issue is whether, with respect to Plaintiffs other than the Clevelands, the Roods and the Rafaels, the trial court properly denied the petition to compel arbitration on the basis that, under section 1281.2, subdivision (c), conflicting rulings might arise if Plaintiffs' petition to compel arbitration were granted.

As we have discussed, section 1281.2, subdivision (c) applies when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . ." Numerous authorities have concluded that it was within a court's discretion under section 1281.2, subdivision (c) to deny a petition to compel arbitration when granting the petition would create the possibility of conflicting rulings on common issues of law and fact. (See, e.g., *Best Interiors, Inc. v. Millie and Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1329-1330 [subcontractor successfully opposed petition to compel arbitration in a case against a general contractor, an owner and building inspectors for unpaid construction costs on the basis that building inspectors would not be joined in the arbitration and possibly inconsistent rulings could arise]; *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 486 (*Whaley*) [petition denied based on possibility of conflicting factual determinations when one party to the dispute was not subject to arbitration]; *C. V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1642 [the risk of conflicting rulings supported ruling denying petition

to compel arbitration brought by one insurance carrier in a case seeking to allocate a settlement amount among numerous insurance carriers, when only one carrier was subject to arbitration].) Plaintiffs contend that applying these authorities, the trial court was within its discretion to deny arbitration on the ground that if VPSS's claims were sent to arbitration, a conflict of rulings on issues of law or fact might arise.

"The standard of review for an order . . . denying arbitration under section 1281.2, subdivision (c) is the well-known test for abuse of discretion." (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101; see also *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

We begin our analysis by observing that three predicates must be established for section 1281.2, subdivision (c) to apply. First, a party to the arbitration agreement must be a party to a pending litigation with a third party. Second, the pending litigation must arise out of the same transaction or series of related transactions as the claims that the petitioner seeks to arbitrate. Third, there must be a possibility of conflicting rulings on a common issue of law or fact in the arbitration and the pending litigation. (See *Whaley*, *supra*, 121 Cal.App.4th at p. 486 [§ 1281.2, subd. (c) "allows the trial court to deny a motion to compel arbitration whenever 'a party' to the arbitration agreement is also 'a party' to litigation with a third party that (1) arises out of the same transaction or series of related transactions and (2) presents a possibility of conflicting rulings on a common issue of law or fact."].)

The first element is present here because a party to the arbitration agreement is a party to a pending litigation with a third party. Specifically, (1) VPSS is a party to the

arbitration agreements at issue here; and (2) VPSS will continue to be a party to a pending litigation involving the Clevelands, the Roods and the Rafaels, as there is no basis on which to compel those parties to arbitrate their claims against VPSS because none of them entered into a contract with VPSS containing an arbitration provision.

The second element is present here because the pending litigation involving VPSS, the Clevelands, the Roods and the Rafaels arises out of the same transaction that gives rise to the claims that VPSS seeks to arbitrate. Indeed, the claims asserted by the Clevelands, the Roods and the Rafaels, like the claims of the rest of the Plaintiffs, arise out of VPSS's construction of the Development, and they all allege that the Development contains common construction defects.

Finally, the third element is present here because there is a possibility of conflicting rulings on a common issue of law or fact in the arbitration and in the pending litigation involving VPSS, the Clevelands, the Roods and the Rafaels. All of the Plaintiffs, including the Clevelands, the Roods and the Rafaels, allege common defects in the Development and assert identical causes of action. It is thus highly likely that the same legal and factual issues would have to be decided in the arbitration proceeding and in this action. Both the arbitrator and the trial court (or a jury) would likely have to decide whether the Development contained the common construction defects alleged by Plaintiffs and whether, as the developer of the Development, VPSS is legally responsible

for those defects. Accordingly, there is a possibility of conflicting rulings on common issues of law or fact.[11]

We accordingly conclude that all three elements are present in this case and justify the application of section 1281.2, subdivision (c). Moreover, as section 1281.2, subdivision (c) gives a court the option to deny a petition to compel arbitration when the elements set forth in the statute are satisfied, we conclude that the trial court was within its discretion under section 1281.2, subdivision (c) to deny VPSS's petition to compel arbitration in order to prevent the possibility of conflicting rulings on common issues of law and fact.

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11 Although the trial court also mentioned the possibility that subcontractors would be brought into the litigation as another situation that could give rise to conflicting rulings, it appears that at the time of the trial court's ruling, no claims had been filed against any subcontractor. Because section 1281.2, subdivision (c) requires "a *pending* court action or special proceeding with a third party" as a ground for a determination that conflicting rulings might arise, it was not proper for the trial court to consider possible *future* claims against subcontractors as part of its analysis under section 1281.2, subdivision (c). (Italics added.)

DISPOSITION

The order denying VPSS's petition to compel arbitration is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCDONALD, J.